84-1092

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

AARON MARK ZIMMERMAN,

Appellant,

-vs.-

ROBERT ABRAMS, as Attorney General of The State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

ON APPEAL FROM THE NEW YORK STATE SUPREME COURT - APPELLATE DIVISION - FOURTH DEPARTMENT

JURISDICTIONAL STATEMENT

GARY J. LAVINE, ESQ.
One South State Street
Syracuse, New York 13202
(315) 475-7777
Counsel for Appellant

QUESTION PRESENTED

Do §§ 24 and 225, New York Workers' Compensation Law and § 479, New York Judiciary Law, violate the Free Speech Clause of the First Amendment of the United States Constitution in so far as they restrict an attorney's right to advertise his or her professional services by direct mail to Workers Compensation claimants and potential claimants?

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Other Authorities:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

AARON MARK ZIMMERMAN,

Appellant,

-vs.-

ROBERT ABRAMS, as Attorney General of The State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

Aaron Mark Zimmerman, the appellant, appeals from the order of the New York State Court of Appeals dated October 18, 1984, and entered on the same date, denying the appellant's motion for leave to appeal the decision of the Appellate Division of the New York State Supreme Court (Fourth Department) filed on April 12, 1984. In its decision, the Appellate Division refused to entertain the appellant's assertion that §§ 24 and 225 of the New York State Workers' Compensation Law and § 479 of the New York State Judiciary Law violate the First Amendment of the New York State Consitution in so far as they restrict and abridge his right to advertise professional services as an attorney by direct mail to Workers' Compensation claimants and potential claimants.

OPINIONS BELOW

The order of the New York State Court of Appeals dated October 18, 1984, denying the appellant's motion for leave to appeal the decision of the Appellate Division appears in the appendix hereto at page 15.

The order of the New York State Court of Appeals dated July 3, 1984, dismissing the appeal on the ground that no substantial constitutional question is directly involved appears in the appendix at page 16.

The decision of the Appellate Division of New York State Supreme Court affirming a dismissal of the appellant's action by a Special Term of New York Supreme Court appears in the appendix at page 17.

The order of Special Term of New York State Supreme Court dated November 30, 1982, dismissing Appellant's action appears in the appendix at page 18.

The order of the New York State Supreme Court dated February 16, 1982, holding that §§ 24 and 225 of the New York State Workers' Compensation Law cannot be applied to appellant so as to bar him from advertising the availibility of his professional services appears in the appendix at page 20.

JURISDICTION

This appeal is being docketed in this Court within ninety days from the final deposition by the New York State Court of Appeals. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

STATUTES AT ISSUE

Section 24, New York State Workers Compensation Law:

Costs and Fees - If the Court before which any proceedings for compensation or concerning an award of compensation have been brought under this chapter, determine that such proceedings have not been so brought upon reasonable ground, it shall assess the cost of the proceedings upon the party who has so brought them. Claims of attorneys and counsellors at law for legal services in connection with any claim arising under this chapter, and claims for services or treatments rendered or supplies furnished pursuant to subdivision (b) of section thirteen of this chapter, shall not be enforceable unless approved by the board. If so approved, such claim or claims shall become a lien upon the compensation awarded, and upon any moneys ordered paid under an award by the board into the special funds provided for in section fifteen subdivision nine and section twenty-five -a, and any other section of this chapter, but shall be paid therefrom only in the manner fixed by the board. Any other person, firm or corporation who shall exact or receive fee or gratuity for any services rendered on behalf of a claimant except in an amount determined by the board, shall be guilty of a misdemeanor. *Any person, firm or corporation who shall solicit the business of appearing before the board on behalf of a claimant, or who shall make it a business to solicit employment for a lawyer in connection with any claim for compensation under this chapter shall be guilty of a misdemeanor.* In case an award is affirmed upon an appeal to the appellate division, the same shall be

payable with interest thereon from the date when said award was made by the board except as provided in section twenty-seven of this chapter.

Emphasis added.

Section 225, New York State Workers Compensation Law:

Fees for Representing Employees - Claims of attorneys and counsellors-at-law for services in connection with any contested claim arising under this article shall not be enforceable unless approved by the board. If so approved, such fee or fees shall become a lien upon the benefits ordered, but shall be paid therefrom only in the manner fixed by the board. Any other person, firm, corporation, organization or other association who shall exact or receive any fee or gratuity for any services rendered on behalf of an employee except in an amount determined by the board, shall be guilty of a misdemeanor. *Any person, firm, corporation, organization or association who shall solicit the business of appearing before the board on behalf of an employee claiming benefits under this article or who shall make it a business to solicit employment for a lawyer in connection with any claim for disability benefits under this article, or who shall exact or receive any fee or gratuity or other charge with respect to the collection of any uncontested claim for disability benefits shall be guilty of a misdemeanor.*

Emphasis added.

Section 479, New York State Judiciary Law:

Soliciting Business on Behalf of an Attorney - It shall be unlawful for any person or his agent, employee, or any person acting on his behalf to solicit or procure

through solicitation either directly or indirectly legal business or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

RAISING THE FEDERAL QUESTION

At the heart of this case is the appellant's assertion that §§ 24 and 225 Workers Compensation Law, and § 479, Judiciary Law, are unconstitutional in so far as they abridge and restrict his right to utilize direct mail to advertise professional services to Workers Compensation claimants. Appellant has vigorously argued this assertion at every stage of this action. (The complaint appears in the appendix at page 22.)

STATEMENT OF THE CASE

Appellant Aaron M. Zimmerman is an attorney maintaining a practice in Syracuse, New York. Zimmerman had placed advertising in the telephone directory including statements that his professional services were available in Workers' Compensation Law matters. He then discovered that §§ 24 and 225, Workers' Compensation Law, arguably make placement of such advertising a criminal offense; he voluntarily called this fact to the attention of the New York State Department of Law.

Thereafter, Zimmerman conducted discussions with the Syracuse office of the Department of Law. In November, 1981, these discussions culminated in Zimmerman and the Assistant Attorney General in Charge entering into an Assurance of Discontinuance pursuant to § 63, subdivision 15, New York State Executive Law.

At about the same time, Zimmerman commenced a declaratory judgment action in the Supreme Court, Onondaga County, titled *Zimmerman v. Abrams,* Index No. 82-1957, challenging the constitutionality of §§ 24 and 225 Workers' Compensation Law under both the First Amendment of the United States Constitution and Article I, § 8 of the New York State Constitution.

Before a trial was had on the matter, the Assistant Attorney General proposed a stipulation by which the Department of Law would take cognizance of the holding in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691, (1977) and agree not to prosecute Zimmerman for advertising the availibility of his professional services in compensation matters. Upon advice of counsel, Zimmerman refused to discontinue his action unless the proposed stipulation was confirmed by a court order. Subsequently, an order by Supreme Court Justice Richard Donovan was signed to that effect on April 6, 1983.

To avoid action by the Grievance Committee, Mr. Zimmerman's attorney initiated inquiries to ascertain the propriety of advertising directed toward claimants and potential claimants for compensation benefits.

Following an inquiry to the Office of Grievance Committees, Paul Ginnelly, Esq., staff attorney, responded in a letter of May 12, 1982, that he saw no objection to Mr. Zimmerman "advertising properly" but going on to state:

> It should be noted that solicitation, as set forth in Sections 24 and 225 of the Workmen's (sic) Compensation Law, is still prohibited.

Mr. Ginnelly's opinion created a serious and substantial doubt in Zimmerman's mind as to whether he could send *advertising letters* to Compensation claimants - as distinct from telephone directory advertising - without incurring the risk of criminal prosecution or disciplinary action.

Zimmerman's attorney conducted discussions with the General Counsel of the New York Insurance Depatment and the General Counsel of the Workers' Compensation Board. On July 8, 1982, a request was made to the Board's counsel for an opinion.

On August 31, 1982, Warren Pesetsky, then counsel to the Workers' Compensation Board, rendered an opinion to Zimmerman's attorney regarding advertising letters. The opinion conceded that in light of *Bates, supra,* several decisions by the New York State Court of Appeals and the order in *Zimmerman v. Abrams, supra,* Worker's Compensation advertising should be regarded as any professional advertising. However, the opinion noted that

> [T]his opinion might be otherwise should such mailing be directed specifically to existing Workers' Compensation claimants who were not currently represented.

Mr. Ginnelly was again requested to review the matter in view of the Board Counsel's opinion and was specifically asked:

> Is the mailing of professional advertisements to existing Workers' Compensation claimants prohibited activity?

Mr. Ginnelly stated that he would take up the matter with David E. Brennan, Chief Attorney, Office of Grievance Committees. Approximately two weeks later, Mr. Ginnelly sent a letter to Zimmerman's attorney that was most disappointing in its lack of responsiveness. After having issued an opinion on May 12, 1982, Mr. Ginnelly now stated in a letter of September 22, 1982:

> . . . this office has been directed by Fourth Department-Appellate Division not to make advisory opinions.

Neither the Board Counsel nor the Office of Grievance Committees rendered a definitive opinion on the question posed by Zimmerman. Viewing the declaratory judgment action as the proper

vehicle to clarify the issue and resolve the uncertainty confronting him, Zimmerman commenced another declaratory judgment action.

In Special Term, Supreme Court Justice J. Robert Lynch took the position that owing to the order granted by Judge Donovan, Zimmerman's action was barred by the doctrine of *res judicata* and granted the Assistant Attorney General's motion to dismiss.

Zimmerman's motion to resettle the order was denied except to amend an erroneous caption.

Zimmerman took the position that Judge Lynch's decision was a "non-answer" that left him with as little guidance regarding the propriety of the proposed letters as he had before the action was commenced.

In its decision, the Appellate Division affirmed Special Term but on the different theory that Zimmerman was seeking an advisory opinion and, hence, no justiciable controversy was presented.

By an order dated July 3, 1984, the New York State Court of Appeals dismissed Zimmerman's appeal brought as of right on the grounds that no substantial constitutional question is directly involved.

Zimmerman subsequently moved before the Court of Appeals for permission to appeal. This motion was denied on October 18, 1984.

THE QUESTION IS SUBSTANTIAL

Under § 479, Judiciary Law, and §§ 24 and 225, Workers' Compensation Law, it is a criminal offense for an attorney to "solicit" legal business from workers compensation claimants. Arguably, then, an attorney sending letters to workers compensation claimants advertising his or her professional services would be liable for criminal penalties. The appellant has raised the serious and substantial question of whether these criminal statutes can successfully withstand constitutional scrutiny with respect to attorney

advertising letter directed to Workers' Compensation claimants. *Bates v. State Bar of Arizona, supra; In The Matter of R.M.J.,* 445 U.S. 191, 102 S. Ct. 929 (1982). The definitive answer to this question is of significant import to many practitioners in New York State.

Of course, the appellant's challenge is not written upon an entirely clean slate. Professional advertising by direct mail and the applicability of § 479, Judiciary Law, have been the subject of several important decisions by the New York State Court of Appeals. See, A. Paul Goldblum, "Regulation of Lawyer Advertising in New York," *New York State Bar Journal,* May, 1984, p. 4.

§ 479, Judiciary Law, utilizes the terms "solicit" and "procure" but does not mention "advertising. " In the wake of *Bates,* § 479 has been somewhat problematical for the Court of Appeals to apply.

Attorney advertising via direct mail is now permitted in New York. *Matter of Koffler,* 51 N.Y. 2d 140 (1980), cert den 450 U.S. 1026, 101 S. Ct. 1733 (1980). In *Koffler, supra,* the Court of Appeals considered the prohibition against solicitation in both the statute and the Code of Professional Responsibility and stated:

> we conclude that neither statute nor code provision can constitutionally prohibit advertising of attorney's services by direct mail addressed to potential clients.

Koffler, supra, p. 144.

Although the court in *Koffler* wrestled with the fine distinction between "advertising" and "solicitation" (see *Koffler, supra,* p. 146), the Court of Appeals ultimately "found the distinction between solicitation and advertising neither determinative nor helpful. " Goldblum, p. 11. See also, *Matter of Discipline of Appert,* 315 N.W. 2d 204, 211, 212 (1981).

Nonetheless, § 479 was not quite ready to be consigned to the junk heap of irrelevancy. For, in *Matter of Greene,* 54 N.Y. 2d 118 (1981), cert den *sub nom, Greene v. Grievance Committee,* 45

U.S. 1035, 102 S. Ct. 1738 (1982), the Court of Appeals proscribed so called "third party mailings" by which real estate brokers were urged to refer clients to the advertising attorneys. In doing so, the Court declared:

> The effect of our *Koffler* decision and of the Supreme Court decisions referred to in that opinion and this is to leave the rule declared by the Legislature in section 479 of the Judiciary Law free to operate in areas not affecting constitutionally free speech . . . The section remains effective except as constitutionally proscribed.

Matter of Greene, supra, p. 124.

§ 479's vitality was reiterated in *Matter of Alessi,* 60 N.Y. 2d 229 (1983):

> respondents . . . had notice from section 479 of the Judiciary Law . . . that all solicitation of legal business was proscribed and as we noted in *Matter of Greene* . . . those provisions remain in effect except as they infringe upon constitutionally protected free speech.

Matter of Alessi, supra, p. 236.

Unfortunately, in New York there exists no mechanism for obtaining official advisory opinions regarding the propriety of proposed professional advertising. Consequently, for attorneys practicing in the every-day world it is something of a matter of guesswork to determine what advertising is proscribed by § 479 and what advertising is "constitutionally protected free speech" not under the ambit of the statute's prohibitions.

Thus, an attorney who had sent advertising letters to accident victims was suspended from practice by the Appellate Division for,

among other things, violating § 479. See *In The Matter of Eric P. von Wiegen,* _____ N.Y. 2d _____ (October 16, 1984) which appears in the appendix at page 25.

The idiosyncratic enforcement of § 479 is clearly shown by *von Wiegen.* On review, the Court of Appeals reiterated its holding in *Matter of Greene* by noting:

> that to the extent section 479 of the Judiciary Law . . . proscribes advertising of attorney's services by direct mail addressed to real estate brokers, those provisions are a constitutionally valid time, place and manner regulation of commercial speech.

Matter of von Wiegen, unpublished opinion, p. 9.

On the other hand, the Court of Appeals held that a "blanket prohibition of mail solicitation of accident victims" is content-based and violates the First and Fourteenth Amendments. *Matter of von Wiegen,* unpublished opinion, p. 6.

Through an agonizingly slow process of *ad hoc* interpretation of § 479 and the Code of Professional Responsibility, the Court of Appeals has opened the door to direct mail professional advertising.

Nonetheless, this *ad hoc* approach to applying what is now a very malleable § 479, Judiciary Law, is perhaps susceptible to the cynical view that the Court of Appeals has been deliberately discouraging experimentation in attorney advertising. How can an attorney know what is permitted conduct and what is not?

In any event, Zimmerman's particular difficulty is that looming over his head is the specter raised by the Office of Grievance Committees and the opinion of the Workers' Compensation Board Counsel that letters sent to Workers Compensation claimants would be unprofessional and illegal. This difficulty is compounded by the plasticity of § 479 and the fact that the Court of Appeals has apparently never made a pronouncement with regard to §§ 24 and 225, Workers Compensation Law in this context.

Advertising letters directed to Workers Compensation claimants are not materially different from those sustained in *von Wiegen.* If anything, there is less opportunity for abuse with respect to those letters since attorney fee arrangements are strictly regulated by the Workers Compensation Board. Thus, § 479 Judiciary Law and §§ 24 and 225, Workers Compensation Law, cannot be constitutionally sustained in so far as they restrict direct mail advertising to Workers Compensation claimants. Not only would such a restriction fail to meet the test enunciated in *Central Hudson Gas & Electric Corp. v. P.S.C.,* 447 U.S. 557, 100 S. Ct. 2313 (1980) which was applied in *von Wiegen,* but the statutes are unconstitutionally vague as well. *Spencer v. Honorable Justices of Supreme Court of Pennsylvania, supra; Discipline of Appert, supra.*

As it now stands, the appellant cannot know with any degree of reasonable certainty whether advertising letters to Workers Compensation claimants are permitted under these criminal statutes. Neither the Office of Grievance Committees nor the Courts of his state will tell him.

Thus, Zimmerman faces the prospect of running the gauntlet of criminal or disciplinary proceedings to vindicate his first amendment rights. His predicament is the same as that confronting the plaintiff in *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, supra:*

> plaintiff is justifiably bewildered as to whether and under what circumstances direct mailing would constitute permissible advertising as opposed to impermissible solitation. *Certainly, if the enforcer cannot define what is being enforced, an alleged violator cannot know what is being violated.*

Spencer v. Honorable Justices, supra, p. 888. Emphasis added.

In order to resolve the issue, must an attorney be compelled to subject himself to criminal or disciplinary proceedings? Such a result would be greatly unfair and is unwarranted:

> plaintiff suffers present injury and an irretrievable loss of first amendment rights to the extent that he obeys the disciplinary rules and thus foregoes his right to engage in arguably protected speech . . . plaintiff is not first required to violate the disciplinary rules and risk his legal career on the hope that his constitutional arguments will be accepted in defense of quasi-criminal proceedings.

Spencer v. Honorable Justices, supra, p. 884.

CONCLUSION

The appellant has raised the substantial question of whether certain New York criminal statutes may be invoked to prohibit an attorney from advertising the availability of professional services by direct mail to Workers' Compensation clients. This question is important not only to the appellant but to many other attorneys in New York State.

Appelllant has, in effect, been told by the courts of his state that in order to obtain an answer to the question he has raised he must expose himself to the risk of prosecution under penal statutes and disciplinary actions by the Office of Grievance Committees. Such a requirement would be grossly unfair and work a severe injustice.

For all of the reasons put forth here, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Gary J. Lavine
One South State Street
Syracuse, New York 13202
(315) 475-7777
Counsel for Appellant

APPENDIX

Order of the New York State Court of Appeals denying Appellant's motion for Leave to Appeal.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of October A.D. 1984

Present,

HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

---

4 Mo. No. 827
Aaron Mark Zimmerman,

Appellant,

vs.

Robert Abrams, as Attorney General &c., and William Kroeger, as Chairman, New York State Workers' Compensation Board,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is dended with twenty dollars costs and necessary reproduction disbursements.

Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

Order of the New York State Court of Appeals dismissing Appellant's appeal.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of July A.D. 1984

Present,

HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

4 Mo. No. 546

Aaron Mark Zimmerman,
Appellant,

vs.

Robert Abrams, Attorney General & c., and William Kroeger as Chairman, New York State Worker's Compensation Board,
Respondents.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Judge Simons took no part.

Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

Decision of the Appellate Division, New York State Supreme Court.

170. (Onondaga Co.) — Aaron Mark Zimmerman, Appellant, v Robert Abrams, as Attorney General of the State of New York, and William Kroeger, as Chairman, New York State Workers' Compensation Board, Respondents. — Order unanimously affirmed without costs. Memorandum: Plaintiff, an attorney, appeals from Special Term's dismissal of his action seeking a judgment declaring that direct mail solicitation of clients with Workers' Compensation claims is not proscribed by sections 24 and 225 of the Workers' Compensation Law, section 479 of the Judiciary Law, or the Code of Professional Responsibility (DR2-103[A]). We affirm upon the ground that the complaint calls for an advisory opinion which we are not empowered to give. There is no indication in the complaint or the affidavit opposing dismissal that a disciplinary proceeding or any other action affecting plaintiff's rights had been or was being taken or was about to be commenced. Therefore, there is no justiciable controversy and any decision by Special Term or our court would be advisory only. "It is fundamental that the 'function of the courts is to determine controversies between litigants * * * . They do not give advisory opinions' " (New York Public Interest Research Group v Carey, 42 NY2d 527, 529, quoting Matter of State Ind. Comm., 224 NY 13, 16; see New York State Assn. of Ins. Agents v Schenck, 72 Misc 2d 434, affd 44 AD2d 757). (Appeal from Order of Supreme Court, Onondaga County, Lynch, J. — Dismiss Action.) Present: Dillon, P.J., Hancock, Callahan, Doerr, Moule, JJ.

Order of the Special Term, New York State Supreme Court dismissing Appellant's action.

At a Special Term of the Supreme Court held in and for the County of Onondaga, at the Court House in the City of Syracuse, New York, on the 30th day of November, 1982.

PRESENT: HONORABLE J. ROBERT LYNCH,
Justice Presiding.

STATE OF NEW YORK COURT OF CLAIMS

AARON MARK ZIMMERMAN,

Plaintiff,

v. ORDER
INDEX NO. 82/6699

ROBERT ABRAMS, as Attorney General of the State of New York and WILLIAM KROEGER, as Chairman, New York State Workers' Compensation Board,

Defendants.

The defendants, Robert Abrams, as Attorney General of the State of New York and William Kroeger as Chairman of the New York State Workers' Compensation Board. having moved this Court for an Order dismissing the above entitled action by Notice of Motion dated November 16, 1982, pursuant to CPLR Rule 3211 (a) (5) and for such other and further relief as to the Court may appear just and proper; and said motion having duly come on to be heard before the Honorable J. Robert Lynch, Judge of the Supreme Court, on the 30th day of November, 1982.

NOW, on reading and filing the Notice of Motion dated November 16, 1982, and upon all the proceedings heretofore had herein; and after hearing the Honorable Robert Abrams, Attorney General of the State of New York, by Lawrence Zimmerman, Assistant Attorney General of

Order of the Special Term, New York State Supreme Court dismissing Appellant's Action.

Counsel, in support of said motion, and Gary Lavine, counsel to the plaintiff herein having appeared and argued in opposition to said motion; and due deliberation having been had thereon; now it is

ORDERED that the above referenced action be and herein is dismissed as being barred by the doctrine of res judicata.

Dated: Syracuse, New York
December 3, 1982

ENTER:

J. Robert Tyler
J. S. C.

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ONC[illegible] OFFICE

CLERK

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Order of the Special Term, New York State Supreme Court regarding application of §§ 24 and 225, Workers' Compensation Law to the Appellant.

At a Special Term of the Supreme Court held in and for the County of Onondaga at the Onondaga County Courthouse, Syracuse, New York, this day of April, 1982.

PRESENT: HON. Richard Donovan
SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

AARON MARK ZIMMERMAN,
Plaintiff,

82-1957APR 682

vs. ORDER

ROBERT ABRAMS, as Attorney General of the State of New York,
Defendant.

Upon the reading and filing of the plaintiff's Summons and Complaint, dated December 18, 1981, which seeks a judgment declaring sections 24 and 225 of the Workers' Compensation Law unconstitutional, and it appearing that the defendant, by George D. Braden, Esq., was duly served on January 8, 1982, and the parties having reached a stipulation with respect to the action herein, now therefore it is

ORDERED, ADJUDGED AND DECREED, that sections 24 and 225 of the Workers' Compensation Law can not be applied so as to bar plaintiff, an attorney, from advertising the availability of his services, including his availability to handle compensation and disability matters.

DATED: April 6 , 1982
Syracuse, New York

S/ Richard Donovan
J.S.C.

Order of the Special Term, New York State Supreme Court regarding application of §§ 24 and 225, Workers' Compensation Law to the Appellant.

Filed & entered April 6 1982
3:11 PM to Mr Dolan

FACSIMILE SIGNATURE USED PURSUANT TO SEC. 602 COUNTY LAW.

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Appellant's Complaint.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

AARON MARK ZIMMERMAN,
Plaintiff,

COMPLAINT IN ACTION FOR DECLARATORY JUDGMENT

vs.

ROBERT ABRAMS, As Attorney General Of The State Of New York, And WILLIAM KROEGER, As Chairman, New York Workers' Compensation Board,
Defendants.

Plaintiff, complaining of the defendants, hereby alleges and shows unto this Court as follows:

1. The plaintiff, Aaron Mark Zimmerman, is duly licensed to the practice of law in this state and maintains his office at One South State Street in the City of Syracuse.

2. The defendant, Robert Abrams, is the Attorney General of the State of New York.

3. The defendant William Kroeger is Chairman of the New York State Workers' Compensation Board.

AS AND FOR A FIRST AND SEPARATE CAUSE OF ACTION, THE PLAINTIFF HEREBY ALLEGES:

4. Upon information and belief, §24 of the Workers' Compensation Law provides, inter alia, that:

> Any person, firm or corporation who shall solicit the business of appearing before the board on behalf of a claimant, or who shall make it a business to solicit employment for a lawyer in connection with any claim for compensation under this chapter shall be guilty of a misdemeanor.

5. Upon information and belief, Section 225 of the Workers' Compensation Law provides, inter alia, that:

> Any person, firm, corporation, organization, or association who shall solicit the business of appearing before the board on behalf of an employee claiming benefits under this article, or who shall make it a business to solicit employment for a lawyer in connection with any claim for disability benefits under this article . . . shall be guilty of a misdemeanor.

6. Upon information and belief, Section 479 of the Judiciary Law provides that:

> It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

7. Upon information and belief, the Code of Professional Responsibility as adopted by the Appellate Division, Fourth Department provides, inter alia:

> A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or an associate to a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule.

8. The plaintiff desires to inform Workers' Compensation claimants and potential claimants by direct mail of the availability of his legal services.

9. Upon information and belief, attorney advertising is commercial speech entitled to the same protection under the First Amendment of the United States Constitution and Article 1, Section 8 of the New York State Constitution as any other form of commercial speech and, specificaly, direct mail advertising is constitutionally protected commercial speech.

WHEREFORE, the plaintiff demands judgment of this Court that Sections 24 and 225 of the Workers' Compensation Law, Section 479 of the Judiciary Law and the Code of Professional Responsibility in so far as they restrict and abridge plaintiff's right to advertise his professional services by direct mail to Workers' Compensation claimants and potential claimants violate the First Amendment of the United States Constitution and Article 1, Section 8 of the New York State Constitution and are therefore, to that extent null and void.
Dated:

TO: ROBERT ABRAMS
Attorney General of the State of New York
State Capitol
Albany, New York

WILLIAM KROEGER, Chairman
Workers' Compensation Board
100 Broadway
Albany, New York

AARON MARK ZIMMERMAN, pro se
GARY J. LAVINE, ESQ.
Attorney for Plaintiff
One South State Street
Syracuse, New York 13202
(315) 475-7777

State of New York
Court of Appeals

10-16-84

SYRACUSE, NEW YORK

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

3 No. 408
In the Matter of Eric P. von Wiegen, Attorney,
Appellant,
Committee on Professional Standards, Third Judicial Department,
Respondent.

(408) Robert M. Cohen, Ballston Lake, & Arthur L. Rosen, Troy, for appellant.
Daniel J. Persing & George B. Burke, Albany, for respondent.

SIMONS, J.

This is a lawyer disciplinary proceeding which has resulted in respondent's suspension from the practice of law for six months because he solicited by mail the victims and families of the 250

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persons injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City, Missouri in July, 1981, he did so by letters that were false and misleading and because, in unrelated advertising, he used a trade name. Respondent contends that the prohibition of direct mail solicitation abridges his constitutional right to free speech (*Bates v. State Bar of Ariz.,* 433 US 350; *Matter of Koffler,* 51 NY2d 140, see, generally, Note, Direct Mail Solicitation by Attorneys: *Bates* to *R.M.J.,* 33 Syracuse L Rev 1041; Goldblum, Regulation of Lawyer Advertising in New York, NYSBJ May, 1984, p. 6), that the evidence before the referee did not establish deception, that the motto he used did not constitute a trade name and that the penalty was excessive.

Respondent graduated from law school in 1974, was admitted to the Michigan Bar and practiced law there for approximately six years before moving to New York. In 1980 he was admitted to practice in this state and he presently maintains his law office in Schenectady. His practice consists principally of personal injury cases.

On April 20, 1982 petitioner, Committee on Professional Standards, Third Judicial Department, commenced a disciplinary proceeding against respondent by filing charges alleging that he, in violation of Section 479 of the Judiciary Law and the Code of Professional Responsibility, (I) engaged in direct mail solicitation of the victims and/or their families of the Hyatt Regency Hotel disaster in Kansas City, Missouri (DR2-103, subds [A], [C], [E]); (II) employed deception and misrepresentation in the letters sent to the accident victims by indicating that a litigation coordinating committee had been formed to assist the victims and that many victims or their families had retained respondent (DR1-102, subd [A], pars 4, 6; DR2-101, subds [A], [B]); and, (III), in an unrelated incident, hired two persons to place flyers advertising respondent's services on automobile windshields in a shopping mall in Schenectady which contained misleading statements and a prohibited trade name - "The Country Lawyer" (DR2-101, subds [A], [C], [E]; 2-102,

subds [A], [B]). (The letters and the flyer are annexed as an appendix to this opinion). After a hearing the referee rejected Charges I and III in their entirety and sustained Charge II insofar as it alleged that the references in the solicitation letter to a committee and to the fact that many victims had retained respondent were misleading.[1] The referee rejected Charge I, concluding that under this Court's ruling in *Matter of Koffler* (51 NY2d 140, *supra*), respondent's solicitation could be regulated but not proscribed by statute or disciplinary rule.

The Appellate Division confirmed the referee's report with respect to the finding of deception contained in Charge II, confirmed portions of Charge III,[2] and otherwise disaffirmed it. In sustaining Charge I, the Appellate Division ruled that a prohibition on direct mail solicitation of accident constituted a restriction on the time, place and manner of speech, rather than its content (see *Matter of Greene,* 54 NY2d 118, 120-121, cert den *sub nom. Greene v Grievance Committee,* 455 US 1035), and noted that such a restriction is supportable if reasonable and related to a substantial state interest (citing *Matter of R.M.J.,* 455 US 191). The court found the ban permissible here because it "related to and supports a variety of substantial State interests, including avoidance of the demoralizing effect such solicitation might have on the profession

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[1]. The referee also found, although there was no charge to the effect, that respondent had violated subdivision (k) of section 806.15 of the department's rules by failing to include his name on the initial letter sent to the disaster victims. Citing *Matter of Doherty* (28 AD2d 546), the Appellate Division concluded that the charge could not be sustained because it was not included in the petition.

[2]. The Appellate Division confirmed the referee's rejection of petitioner's objection to the use of caricatures of Abraham Lincoln and George Washington on the flyer, characterizing them as "innocuous drawings". It also confirmed the referee's determination that the use of flyers does not, *per se,* constitute unconstitutional solicitation. The Grievance Committee has not appealed these determinations.

and the unseemly rivalry reminiscent of 'ambulance chasing' it might generate * * *; avoidance of stirring up litigation and vexatious conduct * * *; and prevention of invasions of privacy * * *" ([citations omitted], ____AD2d____). Addressing Charge II, the court found that proof adduced at the hearing established by a fair preponderance of the evidence that two statements were deceptive and misleading. In sustaining the trade name count of Charge III, it concluded that the use of the phrase "The Country Lawyer" in the flyers violated DR2-102 (subd [B]). The court suspended respondent from the practice of law for six months.

We agree generally with the determination of the referee and we therefore modify the order of the Appellate Division by dismissing Charges I and III and by affirming the determination on Charge II.

I

The primary issue on appeal concerns respondent's right to solicit accident victims by mail. It can be analysed in two ways, by comparing the cases principally relied on by the Appellate Division and the referee and also by employing a structured cnstitutional analysis (see *Central Hudson Gas v Public Serv. Comm.*, 447 US 557, 556) as we did in *Koffler.*

The Appellate Division, in sustaining Charge I and banning direct mail advertising in personal injury cases, relied on *Ohralik v Ohio State Bar Assn.* (436 US 447). In *Ohralik* the Supreme Court held that the potential for fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct was so likely in the context of in-person solicitation of accident victims that a ban on such conduct was constitutionally justified. In *Matter of Koffler* (51 NY2d 140, *supra*), however, we found most of those concerns absent in the direct mail solicitation of real estate clients and held that the mail solicitation employed in that case was constitutionally protected commercial speech which the state may

regulate but not proscribe. The question before us now is whether respondent's solicitation of accident victims and their families by mail implicates the substantial state interests identified in *Ohralik* (436 US 447, 462, *supra*) in a way which distinguishes it from *Matter of Koffler* and justifies proscription of such mailings.[3] Stated another way, is there something unique about lawyer mailings to accident victims as distinguished from similar mailings to prospective real estate clients which requires a result different from that reached in the *Koffler* case? From its analysis of *Ohralik,* the Appellate Division concluded that there was, that mail solicitation of accident victims was similar to in-person solicitation of them and posed a significant threat to the victims' ability to reach a reasoned and informed decision regarding the need for legal representation. That determination suggests that the validity of mailing restrictions depends upon the nature of the legal problem involved, whether it concerns torts or real estate, or some other area of the law.

We view the present case as closer to *Koffler,* basing our decision on the distinction between mail solicitation and in-person solicitation of accident victims because the latter permits the exertion of subtle pressure and often demands an immediate response without providing an opportunity for comparison and reflection. the Supreme Court's decision in *Ohralik* was based on those factors, the elements of intimidation and duress (see *Ohralik,*436 US 447, 462-463, 464-466, *supra*). They are not present in the case of mail solicitation and, as with the real estate client in *Koffler,* the process of decision making may actually be aided by information contained in the mailing. For the reasons which follow, we find the restriction here is not limited to the time, place and manner

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[3]. Only two state cases have been found which addressed the constitutional issues raised by the mail and in-person solicitation of potential tort plaintiffs (see *Matter of Appert,* 315 NW2d 204 [Minn.] [which permitted mail solicitation] and *Matter of Teichner,* 75 Ill 2d 88 [which permitted in-person solicitation of accident victims but also involved associational rights]).

of expression but is content-based, and employing the analysis set forth by the Supreme Court in *Central Hudson Gas v. Public Service Commission,* (447 US 557, 566, *supra*), we hold the blanket prohibition of mail solicitation of accident victims violates respondent's rights of expression under the First and Fourteenth Amendments of the United States Constitution.

It is now familiar law that the Constitution protects from unwarranted governmental regulation, commercial expression, i.e., expression which relates slowly to the economic interests of the speaker and his audience because commercial expression not only serves the economic interests of the speaker but furthers a societal interest in the fullest possible dissemination of information (*Central Hudson Gas v Public Serv. Comm.,* 447 US 557, 561-562, *supra; Virginia Pharmacy Board v Virginia Consumer Council,* 425 US 748, 762; *Bates v. State Bar of Arizona.,* 433 US 350, 363-364, *supra;* see, also, Tribe, American Constitutional Law, §§12-15, pp 651-656). It is subject to a lesser degree of protection than other traditionally protected types of speech but it does, nevertheless, come within the ambit of the First and Fourteenth Amendments (*Ohralik v Ohio State Bar Assn.,* 436 US 447, 455-456, *supra*). Lawyer advertising represents commercial expression (*Bates v State Bar of Ariz., supra*). Thus, although the state, through its professional disciplinary committees, possesses broad power to regulate the legal profession because lawyers are essential to the primary governmental function of administering justice and because they are officers of the court (*Matter of Primus,* 436 US 412, 422; *Goldfarb v Virginia State Bar,* 421 US 773, 792), the recognition that lawyer advertising is a form of commercial speech subject to First Amendment protection requires the courts to eschew blanket prohibitions of solicitation and to assess the validity of the regulation by carefully balancing the First Amendment interest at stake with the public interest allegedly served by the regulation. Categorizing the conduct as advertising or solicitation is of little help in that analysis (see *Bigelow v Virginia,* 421 US 809, 826; *Matter of Koffler,* 51 NY2d

140, 146-147, *supra*). Although some authorities have suggested that the degree of regulation permitted for commercial speech depends upon the type of speech involved i.e., whether it contains explicit product and price information or less substantive matters (see Nowak-Rotunda Young, Constitutional Law, [2d Ed.] p 941), generally the degree of regulation permitted depends, as it does in all First Amendment cases, on the nature of the restriction, i.e., whether it is a restriction of the time, place and manner (see *Consolidated Edison v Public Serv. Comm.*, 447 US 530, 536; *Linmark Assoc. v. Willingboro*, 431 US 85, 93) or of its subject matter or content (see *Erznoznik v City of Jacksonville*, 422 US 205) or whether the restriction is acceptable because it is narrowly tailored to serve a compelling state interest (see e.g. *Lehman v Shaker Heights*, 418 US 298; *Kovacs v Cooper*, 336 US 77). On this appeal we are concerned with mail solicitation dealing principally with fees and available services and whether the restriction concerns the time, place and manner of solicitation or the subject matter of the mailing.

The state is permitted considerably more latitude in restricting the time, place and manner of speech than it is when it attempts to restrict content. Time, place and manner restriction are valid if reasonable and rationally related to legitimate state interests. Content or subject matter may be regulated only if substantial state interests are involved and then the regulation may go no further than necessary to serve that interest.

To be considered a time, place and manner restriction, the restriction must be "applicable to all speech irrespective of content" (*Erznoznik v City of Jacksonville*, 422 Us 205, 209, *supra;* see, also, *Consolidated Edison v Public Serv. Comm.*, 447 US 530, *supra*). The government may determine how, when or where speech is permitted, but it may only do so without reference to the subject matter or content of the speech. Thus, for example, the government may regulate large street demonstrations because held at rush hour or because amplifiers are used if the regulations are neutral

in terms of content (see *Grayned v City of Rockford,* 408 US 104; *Cox v New Hampshire,* 312 US 569). It may not, however, prohibit the display of movies visible from a public street when the restrictions apply only to movies containing nudity (*Erznoznik v City of Jacksonville, supra*).

The Appellate Division, citing *Matter of Greene,* 54 NY2d 118, *supra,* concluded that prohibition of direct mail solicitation of accident victims regulated the time, place and manner of speech because it focused upon the recipient group rather than the subject matter of the speech. *Matter of Greene* is distinguishable, however. That decision held that, to the extent section 479 of the Judiciary Law and DR2-103 (A) of the Code of Professional Responsibility proscribes advertising of attorney's services by direct mail addressed to real estate brokers, those provisions are a constitutionally valid time, place and manner regulation of commercial speech (51 NY2d 120-121). A time, place and manner regulation was present because the proscription did not concern the content of the attorney's letter, i.e., making known to potential clients the availabliity of his services for real estate matters, but only prohibited the attorney from advertising in a particular manner - through a third party whose interests gave rise to potential conflicts of interest (*Matter of Greene, supra,* at pp 126-127). Here, the state seeks to regulate respondent's letter, not because of the involvement of third parties, but because of the subject matter of the communication - the fact that respondent seeks to be retained to represent accident victims and their families (see *Bolger v Youngs Drug Products Corp.,* _____US_____; see *Consolidated Edison v Public Serv. Comm.,* 447 US 530, 536, *supra; Erznoznik v City of Jacksonville,* 422 US 205, 209, *supra; Cox v Louisiana,* 379 US 536, 554, *supra*). As such, the regulation is plainly content-based.

Content-based restrictions are judged by a structured four-part analysis (*Central Hudson Gas v Public Serv. Comm. supra,* at pp 557, 566; see, also, *Matter of Koffler,* 51 NY2d 140, 147, *supra*).

The court must consider (1) whether the communication is outside the scope of constitutional protection - i.e., is it misleading or related to unlawful activity? (2) whether the Government interests sought to be protected are substantial? (3) how directly the regulation advances those interests? and (4) whether there is a less restrictive alternative?

(1) **Is the Communication outside the scope of Constitutional Protection?** There is no constitutional right to disseminate false or misleading information or information about unlawful activity (*Central Hudson Gas v Public Service Commission, supra,* at p 563). Petitioner contends, therefore, that permitting respondent to solicit business by mail notwithstanding the determination of the referee and the Appellate Division that portions of the communication were misleading, deprives it of its recognized power to prevent deceptive advertising. Our inquiry, however, is whether a particular *method* of advertising is inherently misleading. If a certain type of information can be presented in a way that is not deceptive, a state may not absolutely prohibit the method used because it is sometimes used to disseminate misleading information (*Matter of R.M.J.,* 455 US 191, 203, *supra*). Direct mail solicitation of accident victims is not inherently misleading nor is there a history that the practice has led to abuses. Thus, because information on the availability of legal services for accident victims may be communicated in a fair and understandable fashion, absolute prohibition is unwarranted (see, e.g., *Matter of Appert,* 315 NW2d 204 [Minn.]).

(2) **What Substantial Governmental Interests are Protected?** At least four governmental interests can be identified in support of the outright ban on mail solicitation of accident victims: overcommercialization of the profession and the potential for "ambulance chasing"; invasion of privacy and the possibility of undue pressure; stirring up litigation; and the potential for deception.

The Appellate Division attempted to justify a ban on direct mail solicitation of accident victims as a measure necessary to prevent overcomercialization and the potential for practices reminiscent of "ambulance chasing". In *Matter of Koffler* (51 NY2d, *supra,* at p. 149), we noted that overcommercialization is now controlled by the advertising standards set forth in DR2-101. While lawyer advertising may appear unseemly to many members of the profession, particularly where, as here, it is directed at the unfortunate victims of a disaster or their families, it is constitutionally protected and serves the recognized purpose of informing those in need of the cost and availability of legal services (see *Bates v State Bar of Ariz.,* 433 US 350, 364, *supra*).

Furthermore, mail solicitation does not constitute a substantial invasion of privacy or present a risk of undue pressure. The simple answer to the claim that it does is that the recipient of a lawyer's letter "may escape exposure to objectionable material simply by transferring * * * [it] from envelope to wastebasket" (*Consolidated Edison v Public Serv. Comm.,* 447 US 530, 542-543, *supra; Matter of Koffler,* 51 NY2d 140 at 149, *supra*). Nor is avoidance of the intrusion more difficult because the families of accident victims and the victims themselves may be emotionally upset when they receive a solicitation letter. As we noted in *Koffler,* it is not enough to justify a ban on solicitation that in some situations, such as marital discord or a death in the family, the letter might be offensive (*supra,* at 149). The same observation applies to accident victims and their families.

Unlike *Matter of Koffler,* however, solicitation in personal injury cases does pose a danger that litigation will be stirred up. Historically, the Government has exhibited its strong interest in regulating this problem by the offenses of champerty and barratry and undoubtedly, frivolous litigation continues to result in unwarranted economic and societal costs today. Regulations which prevent or inhibit the stirring up of unwarranted litigation serve an important public purpose. Thus, the courts properly should limit

uninvited communications from an attorney which instigate groundless lawsuits and neither further associational values protected by the First Amendment (see *In re Primus,* 436 US 412) nor aid in the dissemination of truthful information about the availibility of legal relief to members of the public in need of such information (cf. *In re Teichner,* 75 Ill 2d 88). In this case, however, the victims and their families had evident need for legal counsel and the mail solicitation of them arguably performed an informational function which the State could not proscribe. As the Supreme Court has said, it is better to address such wrongs than to suffer in silence (see *Bates v State Bar of Ariz.,* 433 US 364, 376, *supra*).

Finally, the potential for deception present in *Matter of Koffler* is also a genuine concern here because these mailings are not subject to the public scrutiny that a newspaper or television advertisement would receive (51 NY2d at 149). Moreover, many people may perceive a potentially greater incentive for deception in personal injury litigation than in other types of legal business because greater sums of money may be involved, the nature of the representation may be less routine, contingent fee arrangements may be employed, and because of past abuses in the area. These are serious concerns, but they are concerns which must be addressed whether the solicitation is in person or in writing and the potential for deception is not greater in mail solicitation. Indeed it may reasonably be contended that the use of writing and the filing requirement approved in *Koffler* helps sanitize statements made in the solicitation of personal injury cases.

(3) and (4) **How Directly Does the Regulation Advance the Identified Governmental Interests - Is there a Less Drastic Alternative?** A compelete ban on the type of solicitation involved here would obviate any danger of deception. However, complete suppression in constitutionally impermissible because the less drastic alternative of filing the letters is present (*Matter of Koffler, supra,* p 150).

In sum, the State cannot establish interests of sufficient magnitude to override the public's interest in receiving information on the availability of legal services and the danger of deception presented by the mailing may be controlled by the filing requirement.

II

Respondent next contends that petitioner failed to present sufficient evidence to support allegations of deception contained in Charge II because testimony by recipients of the mailings was necessary before the writing could be found deceptive.

Petitioner was required to establish the charges by a fair prepondeerance of the evidence (*Matter of Capoccia,* 59 NY2d 549, 553). It satisfied that burden with respect to Charge II by introducing the letters themselves, which, when interpreted in a common sense manner, contain two deceptive statements: (1) that a litigation coordinating committee had been formed to assist the Hyatt Regency disaster victims; and (2) that many accident victims and/or their families had requested representation by respondent. The first statement is misleading because respondent and his former secretary were the sole members of the committee and the statement implies the existence of an entity independent of respondent. The second statement is deceptive because some, not many, families had contacted him, and none had in fact requested representation.

Respondent disputes these findings by adopting a hypertechnical analysis of the term "committee", as encompassing an organization with one member, and a liberal interpretation of "some and many" which minimizes any distinction between those two terms. There was ample support in the record for petitioner's interpretation and there was no need to establish that the letters actually mislead the recipients. It is the potential for deception which is significant (see *Ohralik v Ohio State Bar Assn.,* 436 US 447, 464, *supra*).

III

Finally, the Appellate Division concluded that the use of the phrase "The Country Lawyer" constituted a violation of the prohibition against use of a trade name contained in DR2-103 (subd [B]).

The purpose of the prohibition against trade names embodied in DR2-102 (subd [B]) is to prevent the public from being deceived about the identity, responsibility and status of those who use the name (*Matter of Shannon,* 292 Or. 339; cf. *Friedman v Rogers,* 440 US 1 [use of trade names by optometrists]). The use of the motto "The Country Lawyer" in respondent's flyer did not deceive in that way because the lawyer's name was inserted apart from the motto. The case relied upon by the Appellate Division, *Matter of Shephard* (92 AD2d 978), is distinguishable. In *Shephard,* the court found that the corporate name "The People's Law Firm of Jan L. Shephard, Attorney, P.C. " constituted a trade name because it suggested that the firm was controlled by the public, received public funding or provided legal services on a non-profit basis. No such potential for deception is present in the use of the term, "The Country Lawyer".

Accordingly, the order of the Appellate Division should be modified by dismissing Charge I and Charge III and the matter remitted to the Appellate Division, Third Department for reconsideration of the sanction imposed, and, as modified, affirmed without costs.

406 State St.
Schenectady, N.Y. 12305

EXHIBIT

ATTENTION HYATT REGENCY DISASTER VICTIMS

A Litigation coordinating comittee has been formed to protect the rights and preserve the claims of all persons injured and the families of those deceased in the disaster of July 17, 1981.

An attorney has agreed to provide free legal consultation to assist any persons with questions as to their rights and possible claims arising from this incident.

If you have any questions concerning sources of income available such as social security disability and survivor benefits or questions pertaining to the probate of an estate, transfer of property or your claims against the hotel; property owner and builder call collect (518) 842-6716.

A committee person will be available to assist in the completing of and filing of documents, obtaining accident reports, death certificates, to provide other assistance, information, and help obtain the services you need. This is. a volunteer group and services provided by committee persons are free.

Initial reports released to the media by the hotel representatives imply the accident was the victim's fault. This is absurd. Your interest is not being represented by anyone at the accident site at this time. However, by uniting together each persons claim can be perserved and results of any onesided investigation can be nullified.

Sincerely,

Diane Frost

Diane Frost
Committee Coordinator

EXHIBIT A

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EXHIBIT 3

ATTENTION HYATT REGENCY DISASTER VICTIMS

Many of you have requested representation by attorney Eric P. von Wiegen who volunteered initial FREE consultation concerning your claims against the Hyatt Regency, and others responsible for the death and injuries caused in this disaster.

He has agreed to represent victims or their surviving family members on a contingent fee basis of twenty-five percent (25%) of the sum recovered, after the reinbursement of reasonable and necessary cost incurred in making the recovery. The cost will be pro-rated among those persons represented by Mr. von Wiegen, and will be deducted from any sum recovered, before an attorney's fee is charged.

Because of Mr. von Wiegen's experience in the practice of personal injury litigations involving multiple defendants, and based upon conversations with potential experts, it is his opinion that the liability of the defendants is clear. His usual and customary attorney's fee in such instances is twenty-five (25%). However, he has advised us that should client representation exceed twenty-five persons, his fee shall be twenty percent (20%) to each client represented, and shall be charged as outlined above.

Mr. von Wiegen is an experienced personal injury attorney, licensed to practice in the states of New York and Michigan. He has and does represent clients in many of the other states. If you wish to discuss

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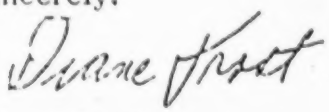
this matter please call COLLECT 518-382-0438 8:30 a.m. to 5:30 p.m. EST, or COLLECT 518-842-6716, evenings to 11 p.m. and weekends.

Sincerely.



Diane Frost
Committee Coordinator

EXHIBIT B

Eric P. von Wie[illegible]

The Country Lawyer

436 State Street
Suite M
Corner of State & Broadway
Schenectady, New York 12305
(518) 382 0438 • (518) 382 0439
Evenings or Holidays (518) 842 8095

FREE EVALUATION & CONSULTATION ON ANY PERSONAL INJURY CLAIM.

****

[illegible]ing litigation arising from accidents [illegible] in spinal cord injuries, loss of limbs, [illegible] other physical bodily injuries causing [illegible] or permanent disability, death or [illegible] occuring in any situation, [illegible]

DEFECTIVE PRODUCTS

[illegible] chemicals, industrial machinery, birth control devices, toys, guns etc.

LEGAL & MEDICAL MALPRACTICE

[illegible] professional malpractice.

AUTOMOBILE - TRUCK - PLANE - MOTORCYCLE - FARM EQUIPMENT ACCIDENTS

****

If this card cannot help you give it to a friend or relative whom it can help.

10/14/81

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I Also Process:

Social Security Disability Claims

Don't attempt to evaluate your own claim. A mistake could cost you substantial sums of money. Lawsuits are an everyday accepted occurance, when tragedy strikes contact a knowledgeable competent attorney immediately to protect your rights and represent your interest.

Legal Fees

Contingent Fees from 20 33 1/3%
depending upon claim

Uncontested divorce	200.00
Separation Agreement	125.00
Partially contested divorce	550.00 to 750.00
Contested divorces	750.00 & up
Simple wills	15.00 (one) 25.00 (two)
Deeds	15.00
Leases, Contracts	20.00 & up

***Fees effective through January 1, 1982 and do not include cost.**

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* * * * * * * * * * * * *

Order modified and matter remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed, without costs. Opinion by Judge Simons. Chief Judge Cooke and Judges Jasen, Jones, Meyer and Kaye concur. Judge Wachtler took no part.

Decided October 16, 1984

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Notice of Appeal to the Supreme Court of the United States.

SUPREME COURT OF THE STATE OF NEW YORK
FOURTH DEPARTMENT

AARON MARK ZIMMERMAN,

Appellant,

-vs.-

ROBERT ABRAMS, as Attorney General of the State of New York and WILLIAM KROEGER AS Chairman, New York State Workers' Compensation Board,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Aaron M. Zimmerman, the above-named Appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court, Appellate Division, Fourth Department, affirming the dismissal of the Complaint, entered on April 12, 1984.

This appeal is taken pursuant to 28U.S.C. §1257(2).

GARY LAVINE
Counsel for Appellant
One South State Street
Syracuse, New York 13202
(315) 475-7777

TO: Clerk, Appellate Division, Fourth Department
Clerk, Supreme Court, Onondaga County
Clerk, New York Court of Appeals
Attorney General of the State of New York

Affidavit of Mailing of Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK
FOURTH DEPARTMENT

AARON MARK ZIMMERMAN,

Appellant,

-vs- AFFIDAVIT OF MAILING

ROBERT Abrams, as Attorney General of the State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

State of New York)
) ss. :
County of Onondaga)

I, Deborah McComber, being duly sworn, say:

1. I am over 18 years of age; I reside at 204 South Alvord Street, Syracuse, New York; I am not a party to the action.

2. On December 21st, 1984, I served the Notice of Appeal by depositing a copy thereof in a post-paid wrapper, in an official depository of the United States Postal Service addressed to:

Clerk, Appellate Division, Fourth Department
Hall of Justice-501 Civic Center Plaza
Rochester, New York 14614

William Kogan, Esq.
Assistant Solicitor General
The Capitol
Albany, New York 12224

Deborah McComber

Affidavit of Mailing of Notice of Appeal.

Sworn to before me this
21st day of December, 1984.

Notary Public

AARON M. ZIMMERMAN
Notary Public in the State of New York
Qualified in Onondaga Co. No 4697848
My Commission Expires March 30, 1985

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Office-Supreme Court, U.S.
FILED
JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

84-1092

No.

IN THE

Supreme Court of the United States

October Term, 1984

AARON MARK ZIMMERMAN,

Appellant,

against

ROBERT ABRAMS, as Attorney General of the State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

ON APPEAL FROM THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

MOTION TO DISMISS APPEAL

ROBERT ABRAMS
Attorney General of the State of New York,
Attorney for Appellees
The Capitol
Albany, NY 12224
(518) 474-7138

ROBERT HERMANN
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

WILLIAM J. KOGAN
Assistant Solicitor General
Of Counsel

Dated: January 23, 1985

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The appeal presented here is not within the jurisdiction of this Court because the federal question which appellant attempts to raise was not passed on by the state courts below 3

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

AARON MARK ZIMMERMAN,

Appellant,

against

ROBERT ABRAMS, as Attorney General of the State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

ON APPEAL FROM THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16 of this Court, the appellees move to dismiss the appeal on the ground that the federal question which the appellant seeks to raise in this Court was not passed on by the courts of the State of New York.

Statement of the Case.

The appellant, an attorney admitted to practice in the State of New York, had previously commenced an action in December, 1981 seeking a judgment declaring that New York Workers' Compensation Law, §§ 24 and 225 and New York Judiciary Law, § 479 violate the First Amendment of the Constitution of the United States in that they restrict and abridge his right to advertise his professional services by direct mail to workers' compensation claimants. On April 6, 1982 an order (20)* was signed and entered, pursuant to stipulation of the parties, directing that the sections in question cannot be applied to bar Zimmerman from advertising the availability of his services to handle workers' compensation matters.

Because the language of the order in that action was not broad enough to encompass direct mail solicitation, Zimmerman commenced this action in October, 1982 again seeking a declaration of the nullity of the subject sections to the extent that they prohibit direct mail solicitation. The Supreme Court did not rule on the merits of this declaratory judgment action. Rather, the court, by an order dated December 3, 1982 (18), dismissed this action as barred by the doctrine of *res judicata*.

On appeal to the Appellate Division of the Supreme Court, Fourth Judicial Department, the order of dismissal was affirmed (17). Again the merits of the action were not considered. The Appellate Division based its affirmance on the absence of any justiciable controversy. The court said:

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*Numbers in parentheses refer to pages in the appellant's appendix.

> "We affirm upon the ground that the complaint calls for an advisory opinion which we are not empowered to give. There is no indication in the complaint or the affidavit opposing dismissal that a disciplinary proceeding or any other action affecting plaintiff's rights had been or was being taken or was about to be commenced." *Zimmerman v. Abrams,* 101 AD2d 691, 476 NYS2d 29.

Zimmerman appealed as of right from the Appellate Division order to the New York Court of Appeals. That appeal was dismissed on respondent's motion "on the ground that no substantial constitutional question is directly involved". 63 NY2d 675 (July 3, 1984). His motion for leave to appeal was denied on October 18, 1984 (15). This appeal ensued.

ARGUMENT.

The appeal presented here is not within the jurisdiction of this Court because the Federal question which appellant attempts to raise was not passed on by the state courts below.

As the foregoing recapitulation of this action reveals, at no point has the substantive issue been considered below. The action was dismissed at the trial level on the basis of *res judicata.* The intermediate appellate court affirmed the dismissal on the basis of the absence of a justiciable controversy. The State's highest court first dismissed the appeal taken as of right and then denied leave to appeal on the basis that no substantial constitutional question was directly involved.

For a state court order to be reviewed by this Court, it must appear from the record that the state courts decided a federal question, either expressly or implicitly. *South-*

land Corp. v. Keating, ____ US ____, 104 S Ct ____, 79 L ed 2d 1, 11 (1984); *First National Bank v. Estherville,* 215 US 341, 30 S Ct 152, 54 L ed 223 (1910). It is not sufficient that the question was raised. The federal question decision is a necessary component for jurisdiction to exist. *Webb v. Webb,* 451 US 493, 101 S Ct 1889, 68 L ed 2d 392 (1981); *Cardinale v. Louisiana,* 394 US 437, 89 S Ct 1161, 22 L ed 2d 398 (1969); *Wilson v. Cook,* 327 US 474, 66 S Ct 663, 90 L ed 793 (1946). Since the federal question has not been considered in this action, no basis exists for jurisdiction.

CONCLUSION.

The appeal should be dismissed.

Dated: Albany, New York
January 23, 1985

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees

ROBERT HERMANN
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

WILLIAM J. KOGAN
Assistant Solicitor General
of Counsel